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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

NO. 76- **76-641**

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSION FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

NO. 76-

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the opinion and judgments of the United States Court of Appeals for the Fifth Circuit entered in these cases on September 27, 1976.

OPINIONS BELOW

Two cases involving identical issues and complementary fact situations under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act are brought to the Court in this petition. Both cases were dealt with in a single opinion by the Court of Appeals for the Fifth Circuit, reported *sub nom Perdue v. Jacksonville Shipyards, Inc.*, 539 F.2d 533, and reprinted as Appendix A* to this petition, pages 5 to 30.

The opinion of Administrative Law Judge Vanderheyden in the *Ford* case is not reported but is reprinted as Appendix B hereto, pages 31 to 51. The opinion of the Benefits Review Board of the Department of Labor in *Ford* is reported at 1 BRBS 367 and is reprinted as Appendix C, pages 52 to 57. The opinion of Administrative Law Judge Devaney in the *Bryant* case is not reported but is reprinted as Appendix D hereto, pages 59 to 87. The opinion of the Benefits Review Board in *Bryant* is reported at 2 BRBS 408 and is reprinted as Appendix E, pages 88 to 95. In both cases the Administrative Law Judges found no federal jurisdiction, the Benefits Review Board reversed, and the Court of Appeals for the Fifth Circuit affirmed the Benefits Review Board.

JURISDICTION

The judgments of the Court of Appeals for the Fifth Circuit were entered on September 27, 1976 (App. pp. 1 and 3). The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

* The Appendices to this Petition are printed under separate cover, hereinafter referred to as App., with appropriate page references.

QUESTIONS PRESENTED

1. Whether by the 1972 Amendments to the Longshoremen's Act,¹ Congress intended to extend the jurisdiction of the Act to categories of pier-side warehouse or terminal workers, none of whose work is ever done on navigable waters and who never unload (physically remove) cargo from or load (physically place) cargo onto a vessel?

2. Whether the employee Ford was "directly involved" in unloading a vessel for purposes of Longshoremen's Act jurisdiction when as a member of a warehouse labor gang he was securing a military vehicle onto a railroad car on the dock after the vehicle had been in storage on or near the dock since the time the delivering vessel had sailed (2 to 17 days before), and Ford's employer had in no way participated in the removal of the military vehicles from the vessel to the storage area.

3. Whether the Longshoremen's Act extended to employee Bryant when as a "cotton header" (terminal worker) he was unloading cotton bales from a cotton dray wagon and storing them in a pier-side warehouse to await the subsequent arrival in port (5 days later) of the vessel on which the cotton was to be loaded by a stevedoring company completely independent from Bryant's employer?

4. In reaching conflicting and confusing results on the basic jurisdictional issue of the extent to which Congress intended to extend the Act's jurisdiction ashore, the various Courts of Appeals also reached conflicting and

1. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq., was amended October 27, 1972. Public Law 92-576.

diverging results on some subsidiary issues under the Longshoremen's Act which this Court will undoubtedly also desire to resolve. These questions are:

- (a) What, if any, deference is owed by a Court of Appeals to the holdings of the Benefits Review Board as to the extent of its own jurisdiction?²
- (b) What, if any, weight is to be given to the statutory presumption that a claim comes within the provisions of the Act, 33 U.S.C.A. §920, which this Court has held is inapplicable when there is substantial evidence that the claim does not come within the provisions of the Act?³
- (c) Whether unsworn, ex parte statements of counsel alone, followed by an affirmative refusal to grant a hearing, as requested by Petitioners, are sufficient to sustain an award of attorneys' fees without violating the due process clause of the Fifth Amendment to the Constitution?⁴

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. §902(3):

The term "employee" means any person engaged in maritime employment, including any longshoreman

2. See full discussion *infra*, pp. 33-35.

3. See full discussion *infra*, p. 35.

4. See full discussion *infra*, p. 36.

or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. §903(a):

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

The legislative history in those portions of both the Senate and House Committee Reports entitled "Extension of Coverage to Shoreside Areas" is reprinted as Appendix I, Pages 183 to 186. These portions of the reports are identical.

STATEMENT OF THE CASE

In 1972, Congress extended the reach of the Longshoremen's and Harbor Workers' Compensation Act⁵ shoreward across the water's edge boundary line recognized by this Court in 1969.⁶ These cases⁷ are among the first⁸ to reach this Court upon full records under the amended Act and present urgent⁹ questions of statutory construction involving the post-amendment jurisdiction of the Longshoremen's Act.

Petitioners are employers¹⁰ of persons who work in the dockside areas adjoining navigable waters. The Respondent employees are workers who sustained injuries while transferring breakbulk cargo to or from land transportation in a shoreside storage area.¹¹ All facts were stipulated

5. 33 U.S.C. §901 et seq. Hereinafter referred to as the Longshoremen's Act or the Act.

6. *Nacirema Operating Company v. Johnson*, 396 U.S. 212, 24 L.Ed. 371, 90 S.Ct. 347 (1969).

7. Two cases presenting complementary fact situations (loading, unloading) were decided by the court below in a single opinion and are brought to this Court together in this petition. Rule 23(5), Rules of the Supreme Court of the United States.

8. Applications for writs of certiorari to the Courts of Appeals for the First and Second Circuits are also pending before this Court in similar cases. No. 76-454, *International Terminal Operating Co., Inc. v. Blundo*; No. 76-444, *Northeast Marine Terminal Company, Inc. v. Caputo*; No. 76-571, *John T. Clark & Son of Boston, Inc. v. Stockman*.

9. The urgent need for resolution of the issues raised by these cases is documented in the Petition for a Writ of Certiorari pending in the *Blundo* case, No. 76-454, in terms of the number of pending cases affected (see *Blundo* petition, p. 10 n. 7) and in terms of the number of workers involved (see *Blundo* petition, p. 21).

10. And their compensation insurance carrier.

11. It is not disputed that both accident sites were geographically cargo handling areas adjoining navigable waters.

in both cases, and the Solicitor of Labor participated in the development of the stipulations on behalf of the Director, Office of Workers' Compensation Programs. At the time of his injury,¹² Respondent Ford was standing on a railroad flatcar securing a military vehicle for carriage to an inland arsenal. The military vehicle had been returned to the United States on a ship and had been stored in an open, shoreside storage area pending its on-carriage by rail. The ship which delivered the military vehicle had departed prior to the day of the accident,¹³ and Ford and his co-workers were hired from the warehousemen's local union of the International Longshoremen's Association to secure the military vehicles on the railcars. No ship was at the dock, and in any event, the applicable labor contracts would have prohibited these workers from the warehousemen's local union from working aboard ships or assisting in the movement of cargo directly to or from ships. (App. p. 40)

Respondent Bryant was injured¹⁴ while standing on a cotton dray wagon utilized to bring cotton bales from a compress company to a shoreside warehouse for eventual

12. April 12, 1973 at the Port of Beaumont, Texas. The Administrative Law Judge below made full fact findings based on the stipulations, and these fact findings are reprinted in his opinion below. App. p. 33. Petitioners have accordingly not deemed it necessary to reprint at this time the stipulations from the record below.

13. The military vehicles being loaded that day had arrived on one of two ships, and had been unloaded from the ship and placed in the storage area either two or seventeen days before Ford's accident. The Petitioner (Ford's employer) had not participated in any way in the unloading of either of the ships.

14. May 2, 1973, at the Port of Galveston, Texas. The Administrative Law Judge below made full fact findings based on the stipulations, and these fact findings are reprinted in his opinion below. App. p. 62. Petitioners have accordingly not deemed it necessary to reprint at this time the stipulations from the record below.

shipment overseas. He was assisting the wagon driver in unloading the bales from the wagon and "heading" them into a storage location in the pier-side warehouse. The cotton bales being handled were subsequently loaded aboard a ship which arrived in port five days after Bryant's injury. Petitioner (Bryant's employer) performs no ship loading or unloading work, and the bales in question were eventually loaded aboard ship by a stevedoring company completely unrelated to Bryant's employer.¹⁵

In both the *Ford*¹⁶ and *Bryant*¹⁷ cases, an administrative law judge¹⁸ found that the employees were not engaged in maritime employment within the meaning of the Act as amended and so were not within the shoreside jurisdiction of the Longshoremen's Act. The Benefits Review Board¹⁹ in separate opinions²⁰ reversed the administrative law judges, disregarding the findings of the administrative law judges and holding that the cargo in each case had not come to rest and that the jurisdiction of the Act extended to the activities of the claimants.

15. Bryant's employer does have some employees who go aboard ship in the course of their ship agency duties, but the applicable labor contract pursuant to which Bryant was hired precludes Bryant or any other "cotton header" from doing so.

16. App. pp. 31-51.

17. App. pp. 59-87.

18. The fact finding duties of the Deputy Commissioner were transferred to the administrative law judges of the Department of Labor by the 1972 amendments. 33 U.S.C.A. §919(d).

19. The Benefits Review Board was created by the 1972 Amendments to the Longshoremen's Act. 33 U.S.C.A. §921(b). It consists of three members appointed by the Secretary of Labor and acts solely to hear and determine appeals with respect to claims under the various federal workmen's compensation statutes, e.g.: the Longshoremen's Act; the Defense Base Act, etc.

20. *Ford*: 1 BRBS 367, App. pp. 52-58; *Bryant*: 2 BRBS 408, App. pp. 88-95.

Review of the Board's opinions in *Ford* and *Bryant* was sought in the United States Court of Appeals for the Fifth Circuit pursuant to 33 U.S.C.A. §921(c), and the two cases were dealt with in a single opinion by the Court of Appeals.²¹ The court by a reduced panel²² restricted its review by reference to a statutory presumption²³ and by deference to purported agency expertise,²⁴ and affirmed the decisions of the Benefits Review Board. (Opinion below, 539 F.2d 533, App. p. 5). Specifically, the court stated that there was no point of rest at which the maritime character of the dockside cargo handling process begins or ends,²⁵ and implicitly defined "unloading a ship" as the entire "process of moving maritime cargo

21. *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, App. pp. 5-30. Three shipyard cases involving the jurisdiction of the Longshoremen's Act were also argued with the *Ford* case, and all five cases were treated by the Court of Appeals in a single opinion. The shipyard cases are listed in the style of the opinion below, App. p. 5.

22. Judge Thornberry heard oral argument but due to illness did not thereafter participate in the decision of the court. 539 F.2d at 536 n. *, App. p. 6.

23. 539 F.2d at 541, App. pp. 17-18. The statutory presumption that "the claim comes within the provisions of this Act," 33 U.S.C.A. §920(a), is in fact inapposite by its own terms when there is substantial evidence to the contrary. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

24. 539 F.2d at 541, App. p. 18. As shown below, pp., other Courts of Appeals have recognized that such deference is totally inappropriate with regard to jurisdictional interpretations and with regard to this particular agency.

25. 539 F.2d at 540. To justify this broad expansion of federal jurisdiction, the Court invoked a principle of liberal construction of the Longshoremen's Act in favor of injured employees, citing this Court's opinion in *Voris v. Eikel*, 346 U.S. 328, 98 L.Ed. 5 (1953). *Eikel* involved the notice provisions of the Act, however, and it is a basic misapplication of the principle there expressed to employ it to extend federal jurisdiction as a matter of statutory interpretation.

from a ship to land transportation." 539 F.2d at 543, App. p. 22. The prior holdings of this Court regarding "maritime employment" for purposes of the Longshoremen's Act were dismissed by the court below as "scattered" and "timeworn" dicta, 539 F.2d at 539 n. 12, said to be rendered obsolete by the 1972 Amendments to the Act.²⁶

REASONS FOR GRANTING THE WRIT

In its opinion and decisions in these cases, the court below has departed dramatically from the prior opinions of this Court and from the opinions of several of the Courts of Appeals. These conflicts pertain to the important question of the statutory jurisdiction of the Longshoremen's Act as amended, and require prompt and authoritative resolution by this Court.

1. CONFLICT WITH THE DECISIONS OF THIS COURT.

The holding of the Court below that the injured employees, Bryant and Ford, were engaged in "maritime employment" at the time of their injuries is directly in conflict with this Court's decisions in:

Pennsylvania Railroad Company v. O'Rourke, 344 U.S. 334, 97 L.Ed. 367, 73 S.Ct. 302 (1953).

Noguiera v. New York, N.H. & H.R. Co., 281 U.S. 128, 74 L.Ed. 754, 50 S.Ct. 303 (1930).

The term "maritime employment" is not new to the Longshoremen's Act, having been used by Congress in defining the term "employer" for purposes of the original

26. The holdings so characterized are neither dicta nor obsolete. See full discussion *infra*, pp. 18 to 20.

1927 statute as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)" 33 U.S.C.A. §902(4). In both *O'Rourke* and *Noguiera*, this Court held that the term "maritime employment" as used in the Longshoremen's Act means that employment at least a part of which is performed upon the navigable waters of the United States.

In *O'Rourke*, this Court held a railroad brakeman was engaged in "maritime employment" within the meaning of the Longshoremen's Act only because a part of his work on the date of his accident was performed on a car float on navigable waters. The majority opinion so held despite the vigorous protest of the dissenting justices that "If this railroad employee had been doing his braking job on land, no one would have thought he was engaged in anything but railroad employment," and that it did not "become maritime employment because it happened over navigable waters." 344 U.S. at 342, 97 L.Ed. at 374.

O'Rourke was a reaffirmation of this Court's earlier decision in *Nogueira*, in which it was held that a railroad employee loading freight into railroad cars on a car float was in "maritime employment" within the meaning of the Act only because a part of his work on the day of the accident was upon navigable waters of the East River in New York Harbor.²⁷ As *Nogueira* reflects, this was

27. The Court of Appeals for the Second Circuit in *O'Rourke* sought to limit and distinguish this Court's decision in *Nogueira* on the grounds that railroad employee *Nogueira* was engaged in maritime employment because he was working as a freight handler in loading a ship, whereas *O'Rourke* was doing the work of a railroad brakeman, duties which were "peculiar to the business of railroading alone." 194 F.2d 612, at 614. In holding that the work of both railroad employee *Nogueira* and railroad brakeman *O'Rourke* was

completely consistent with prior holdings of this Court, as in *State Industrial Commission v. Nordenholt*,²⁸ that maritime employment for purposes of workmen's compensation laws did not include dockside cargo handling activities. In *Nordenholt*, the employee was stacking sacks of cement on the dock as they were being discharged from the ship, and the state courts of New York had held that the maritime exclusivity doctrine of *Southern Pacific Company v. Jensen*²⁹ precluded any state workmen's compensation remedy. This Court reversed on the basis that dockside cargo handling activities were not maritime employment,³⁰ and thus there was no need to be concerned with the application of a uniform maritime law as to such non-maritime employment, i.e., employment performed solely on the dock.

As *O'Rourke* holds, prior to the 1972 Amendments only the "employer" had to meet the "maritime employment" status requirement (hereafter "status test"), and the "employee" had to meet only the situs requirement

"maritime employment" within the meaning of the Act solely because they were working on a car float on navigable waters, the Supreme Court in *O'Rourke* said:

"... Whether the injury occurred to an employee loading freight into cars on the float, as in the *Nogueira* case, or to one like respondent moving loaded cars from a float could make no difference. Both employments are maritime. See *Nogueira v. New York, N.H. & H.R. Co.*, supra (281 U.S. at 134) . . ." 344 U.S., at 339, 97 L.Ed., at 373.

28. *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 66 L.Ed. 933 (1922).

29. *Southern Pacific Company v. Jensen*, 244 U.S. 205, 61 L.Ed. 1086, 37 S.Ct. 524 (1917).

30. As recently as 1971, this Court noted that the *Nordenholt* case had never been overruled and still was instructive concerning the application of maritime principles. *Victory Carriers v. Law*, 404 U.S. 202, 30 L.Ed.2d 383, 92 S.Ct. (1971).

of injury upon navigable waters (hereafter "situs test"). In extending the Act's jurisdiction to certain areas ashore in the 1972 Amendments, Congress added the requirement that the "employee" also meet the maritime employment status test³¹ and expanded the area to be included in the situs test to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel," 33 U.S.C.A. §§902(4), 903(a).³² While both *Ford* and *Bryant* sustained their injuries within the expanded adjoining area and thus satisfy the situs test, the undisputed and stipulated facts in each case conclusively establish that neither of them can meet the maritime employment status test of *O'Rourke* and *Nogueira*.

31. Prior to the 1972 Amendments, the Act defined the term "employee" as follows:

"The term 'employee' does not include a Master or a member of a crew of any vessel, nor any person engaged by the Master to load or unload or repair any small vessel under 18 tons net." 33 U.S.C.A. §902(3)

In the 1972 Amendments, Congress redefined the term "employee" as follows:

"The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and ship breaker, but such term does not include a Master or member of the crew of any vessel or any person engaged by the Master to load or unload or repair any small vessel under 18 tons net." (Emphasis supplied). 33 U.S.C.A. §902(3).

32. The court below recognized this two-fold requirement when it said:

"... Congress has replaced the old 'waters edge' analysis with a two-part test which requires (1) that the claimant have been engaged in 'maritime employment' and (2) that the injury have taken place on the situs specified in the Act." 539 F.2d 533, at 538, App. pp. 11-12.

The Court below held that the employee Ford was engaged in maritime employment while, as a member of a warehouse securing gang, he was securing a military vehicle onto a railroad car on the dock. The vehicle had been unloaded from a vessel at least two, and possibly as many as 17 days, prior to this injury by a longshore gang employed by a stevedoring company completely unrelated to Ford's employer. It was impossible for Ford or any member of his securing gang to perform any of their work on the date of his injury on navigable waters for three reasons:

- A. There was no vessel at the dock on which the railroad car was situated at the time; (App. p. 35)
- B. Warehouse securing gangs such as the one of which Ford was a member never do any work on navigable waters;³³ (App. p. 37)
- and
- C. Ford's employer had nothing to do with the unloading of the military vehicle from the vessel on which it was brought to the Port of Beaumont.³⁴

The employee Bryant was held to be engaged in maritime employment while working as a cotton header un-

33. In fact, the contract between Ford's employer and his warehouse union local prohibited it, (App. p. 41) and the labor trouble which would have resulted had his employer assigned him work to do on navigable waters which was reserved to the longshore union local is not difficult to envision.

34. In fact, Ford's employer hired him to perform work which it had contracted to do with the Port of Beaumont Navigation District, purely warehouse functions once the cargo had been unloaded from the vessel and stored on the dock by longshoremen employed by a stevedoring company completely unrelated to Ford's employer or the Port of Beaumont Navigation District. App. pp. 39-40.

loading bales of cotton from a cotton dray wagon to store them in a pier-side warehouse. The baled cotton remained stored in the warehouse until five days later when it was loaded aboard a vessel by a stevedoring company completely unrelated to Bryant's employer. For the same three reasons as in Ford's case, it was impossible for Bryant to perform any of his work in storing the cotton in the warehouse on the navigable waters:

- A. There was no vessel at the pier as the vessel on which the cotton was loaded would not arrive in port for five days and probably was on the high seas;
- B. Cotton headers such as Bryant never do any work on navigable waters;³⁵
- and
- C. Bryant's employer never loaded or unloaded any cargo from any vessel at any time as it did not include stevedoring services among those which it offered or furnished to vessels.³⁶

35. The contract between Bryant's employer and his warehouse union local also prohibited such work, and as Bryant's employer never furnished stevedoring services (the typical longshoring activity of taking cargo on or off a vessel) to any vessel, it had no contract with the longshore union local, and the labor trouble which would have resulted had his employer tried to assign him to do work reserved to the longshore union local would be substantial indeed. (App. pp. 65, 84).

36. As the stipulated facts show, Bryant's employer was a steamship agency. On outbound cargo such as was involved in *Bryant*, his employer's function was to unload cargo from land transportation and store it in the pier-side warehouse until its client's vessel arrived in port when it would be loaded aboard the vessel by longshoremen employed by a stevedoring company unrelated to the steamship agency. Bryant's employer did not furnish stevedoring services to any vessel, and thus was never "directly involved" in loading or unloading vessels (physically removing from or putting cargo onto vessels).

On these stipulated facts, neither Ford, Bryant or any of their co-workers in the same job categories could possibly satisfy the *O'Rourke/Noguiera* definition of "maritime employment" for purposes of the Longshoremen's Act. The court below, however, held both Ford and Bryant were engaged in "maritime employment" and thus satisfied the status test of Longshoremen's Act jurisdiction, apparently because the court below concluded that they met one of its stated tests:

"... at the time of his injury

(a) he was performing the work of loading, unloading, repairing, building or breaking a vessel,

or

(b) although he was not actually carrying out these specified functions (loading, unloading a vessel?), he was "directly involved" in such work (loading, unloading a vessel?). (Parenthetical expressions added. See 539 F.2d at 539-540, App. p. 14).

In trying to apply this status test as to Ford, the court below apparently concedes he was not "performing the work of . . . unloading . . . a vessel," for the most it is able to say about Ford's work is that it was "an integral part of moving maritime cargo from a ship to land transportation." 539 F.2d at 543, App. p. 22. In spite of the Administrative Law Judge's general fact finding to the contrary (App. pp. 47-48), the court holds as a matter of law that on this basis Ford was "directly involved in 'longshoring operations' such as unloading a ship." *Id.* Such a holding is necessary to the court's result below,

because part (b) of the court's own test requires that he be "directly involved" in unloading the vessel³⁷—yet this is a statement the court below could not make if the quoted words have any conventional meaning, because the vessel had left the Port of Beaumont at least two days and possibly as many as seventeen days before the injury.³⁸ The court below reached similar conclusions as to cotton header Bryant. One might reasonably conclude Ford was "directly involved" in "securely fastening the military vehicles to the railroad cars," but it would be difficult, given the ordinary meaning of the words, to conclude that he was even "indirectly involved" in unloading a vessel which had sailed 2 to 17 days before. One might also reasonably conclude Bryant was "directly involved" in unloading cotton from the dray wagon and storing it in the warehouse, but very few, if any, would even say he was "indirectly involved" in loading a ship which was still on the high seas!

37. The Court below had to use the terminology "directly involved" because as its opinion recognizes, Congress did not intend to cover any employees who were not "directly involved" in the loading or unloading functions. 539 F.2d at 539, App. p. 14. In doing so, however, it stretched and distorted the plain, common, ordinary meaning of the word "directly" beyond all semblance of reason. Webster defines "directly" as "1. In a direct manner; without anything intervening. 2. Straightway; at once." Webster's New Collegiate Dictionary, p. 234 (1961).

38. While this period of a few days to a couple of weeks is probably the usual period of storage on the dock, sometimes the cargo remains on the dock or in the dock-side warehouse for many weeks or even months. (The coffee bags involved in the injury to employee Dellaventura in the Second Circuit case had been unloaded from the vessel 133 days before his injury. App. p. 147). As the court below would have it, apparently even if several months had intervened between the removal of the military vehicle from the vessel or the cotton bales from the dray wagon, it would still consider both Ford and Bryant to be "directly involved" in the unloading and loading of a vessel.

To reach its desired result, the Court below summarily dismissed *O'Rourke*, as well as one of its own decisions in which it had applied the *O'Rourke* maritime employment test,³⁹ and completely ignored *Noguiera* except by implication. It did so for two stated reasons:

1. This Court's discussion of the meaning of the term "maritime employment" in the Longshoremen's Act in *O'Rourke* was only "scattered dicta" and "time-worn dicta" and therefore "entitled to little weight." 539 F.2d at 539 n.12, App. pp. 12-13. **NOTHING COULD BE FURTHER FROM THE TRUTH!**
2. These older cases were necessarily limited by the "water's edge" approach of the Act prior to the 1972 Amendments and therefore could not have any bearing on the meaning of the same term "maritime employment" after the 1972 Amendments. The 1972 Amendments and their legislative history belie this reason as both the Senate and House Committee Reports reaffirm the *O'Rourke-Noguiera* interpretation of the term "maritime employment" in the Act.

In consigning *O'Rourke* to the scrap heap of scattered and timeworn dicta, (which this Court has declined to do as recently as 1974,)⁴⁰ after the 1972 Amendments to the Act, the court below fell into the same error others have

39. *Nalco Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969).

40. In fact, this Court in effect reaffirmed and relied on *O'Rourke*. See *Cooper Stevedoring Company v. Kopke*, 417 U.S. 106, at 114, 40 L.Ed.2d 694, at 702, 94 S.Ct. 2174 (1974) in which this Court explains in some detail that its per curiam affirmance of *Atlantic Coast Line Railroad Company v. Erie Lackawanna Railroad Company*, 406 U.S. 340, 32 L.Ed.2d 110, 92 S.Ct. 1550 (1972), was based on its holding in *O'Rourke*.

made in concluding that *O'Rourke* merely holds that only the "employer" had to meet the "maritime employment" test and did not determine what the term meant as used in the Act! A hurried or casual reading of *O'Rourke* might well lead even an experienced Circuit Judge to jump to such an erroneous conclusion, but the one and only disputed issue which this Court had to resolve in *O'Rourke* (and *Noguiera*) was whether his railroad employer was engaged in "maritime employment" within the meaning of the Act. This Court held the railroad was engaged in "maritime employment" because both *O'Rourke* and other railroad employees performed a part of their work on navigable waters.⁴¹ Until this Court made this determination of the meaning of "maritime employment" in the Act, *O'Rourke* was completely free to pursue his railway employee remedies for damages under the Federal Employers' Liability Act, 45 U.S.C.A. §51, et seq. But once the holding was made he lost his railroad employee remedies and had to accept the remedy he did not want—compensation under the Longshoremen's Act. Such a holding mere dicta—gratuitous, unnecessary comments on an issue not essential to the

41. As its opinion reflects, this Court did not have to find that *O'Rourke* himself was engaged in maritime employment to make the Act applicable to him since his injury occurred upon navigable waters and the railroad had "other employees" who worked in part on navigable waters. Thus, technically, the Court below might be considered to be correct in calling the holding that *O'Rourke* was engaged in maritime employment mere dicta. However, this Court still had to define the meaning of maritime employment as to the other railroad employees on which it relied to make the railroad an employer within the meaning of the Act. It found the other employees engaged in maritime employment only because they performed a part of their work on navigable waters. Thus, even if one considers the holding as to *O'Rourke* alone dicta, this Court's holding as to the other railroad employees cannot be considered as anything but what it was—the very foundation upon which this Court resolved the only disputed issue in that case.

Court's decision in the case? Obviously not, for it resolved the only disputed issue in the case—whether O'Rourke was entitled to the railroad employee's remedies he sought or had to take what he did not want, the "maritime employment" remedy under the Longshoremen's Act. The marine commerce work being done in *Noguiera* did not distinguish that case from the railroad work being done in *O'Rourke*: Maritime employment was work on the navigable waters, not handling cargo destined for or received from marine commerce. And indeed, so had this Court previously held when in *Nordenholt* it ruled that handling cargo ashore as it was being received from marine commerce was not maritime employment for purposes of workmen's compensation laws.

The second basis on which the Court below sought to avoid the *O'Rourke-Noguiera* meaning of "maritime employment" is equally unfounded. When Congress added the "maritime employment" requirement to employees in the 1972 Amendments, thus requiring both employers and employees to meet this status test, it used precisely the same term this Court had interpreted in *O'Rourke* and *Noguiera*—"maritime employment." But of even more significance, Congress made it unequivocally clear in both the Senate and House Committee Reports that this Court's interpretation of the term "maritime employment" was to remain unchanged by the 1972 Amendments:

" . . . Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole

or in part, on navigable waters is not covered even if injured on a pier adjoining navigable waters." 1972 U. S. Code Cong. and Administrative News 4708, App. pp. 185-186.

These two sentences⁴² make it perfectly plain that the *O'Rourke-Noguiera* interpretation of "maritime employment" was not only recognized by, but fully approved by the Congress—an employer is not engaged in "maritime employment" and therefore is not subject to the Act, if none of its employees work in whole or in part on navigable waters.⁴³ Even the Court below acknowledges the

42. In these two sentences the Committees express the same requirement two ways: (1) . . . must have some employees in "maritime employment," and (2) . . . must have some employees working on navigable waters. The last clause of the quotation is conclusive that work on a pier adjoining navigable waters is not "maritime employment" for purposes of the Longshoremen's Act. Note the consistency of this Congressional understanding with the result in this Court's *Nordenholt*, *O'Rourke*, and *Noguiera* cases.

43. These two sentences are not the only ones contained in the Committee Reports which confirm the intent of Congress to keep the *O'Rourke-Noguiera* maritime employment test. Also see:

1. "The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." 1972 U.S. Code Cong. and Administrative News, p. 4708, App. p. 184.

If the work to which the employees were assigned on the date of an accident would not require them to work in whole or in part on navigable waters, any injury of necessity could not occur "over water" and no such "fortuitous circumstance" could occur.

2. "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." *Id.* p. 4708, App. p. 185.

Obviously, a uniform compensation system exists now, as it did prior to the 1972 Amendments, if all of the work activities are performed on land or all of it is on water. It was only when a "part of their activity" on the date of the accident for the employer was upon navigable waters and a part was

term "maritime employment" must be given the same meaning in the definition of an employee, 33 U.S.C.A. §902(3), as it is given in the definition of an employer, 33 U.S.C.A. §902(4). 539 F.2d at 539 n. 10, App. p. 12.

The completely erroneous reading of *O'Rourke* and *Noguiera* and consideration of them as only involving

on land that there was a lack of uniformity prior to the 1972 Amendments. It was this "... disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs" which Congress expressly stated it desired to eliminate. Id. p. 4707, App. 184.

3. "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel just because they are injured in an area adjoining navigable waters used for such activity." Id. p. 4708, App. p. 185.

Injury in an adjoining area is not enough, the employee must be engaged in loading or unloading "a vessel," an activity which clearly requires the employees to work at least in part on navigable waters.

4. "Thus, employees whose responsibility is only to pick up cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." Id. p. 4708, App. 185.

As to cargo which has already been "unloaded from the ship and immediately transported to a storage or holding area," Congress here recognized that the employees who pick it up for transshipment do not work in whole or in part on navigable waters, any more than the purely clerical workers whose jobs do not require them to participate in the loading or unloading of cargo, and therefore expressed its intention that they were not to be covered by the extension ashore.

5. "However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." Id. p. 4708, App. p. 185.

Only those cargo checkers who are "directly involved" in loading or unloading a vessel perform a part of their work on navigable waters and for that reason only Congress states its intent for them to be covered by the new amendment extending the jurisdiction of the Act ashore. Obviously any cargo checkers not "directly involved" in loading or unloading a vessel would not perform a part of their work on navigable waters and therefore would not be covered.

scattered and timeworn dicta insofar as the meaning of the term "maritime employment" in the Act is concerned, and the complete failure to recognize that the legislative history reaffirmed this Court's interpretation of that term as it is used in the Act, has caused the court below to reach a result which is in direct conflict with this Court's decisions in *O'Rourke*, *Noguiera*, and *Nordenholt*. This Petition should be granted to resolve that conflict.

2. CONFLICTS WITH OTHER COURTS OF APPEALS.

This Court should grant this Petition to resolve the direct and irreconcilable conflict between the decision of the court below and the decisions of the Second, Third and Fourth Circuit Courts of Appeal in the following cases:⁴⁴

I.T.O. Corporation of Baltimore v. Adkins, ___ F.2d ___ (4th Cir. in banc, August 26, 1976), App. p. 96.

Sealand Service, Inc. v. Johns, ___ F.2d ___ (3d Cir., August 5, 1976), App. p. 114.

Pittston Stevedoring Co. v. Dellaventura, ___ F.2d ___ (2d Cir., July 1, 1976), App. p. 137.

44. The court below does not cite, consider or refer to any of these cases in its opinion although all of them were made available to it by Petitioners in a post-argument brief filed on September 9, 1976. Two and a half weeks later the decision below was rendered on September 27, 1976, by a two-judge panel resulting from Judge Thornberry's illness which prohibited him from participation after oral argument. Two and a half weeks after the decision, Petitioners Motion for Leave to File the opinions and its comments thereon was denied by the court below on October 15, 1976. And, of course, the court had the original panel decision from the Fourth Circuit at the time of oral argument. Perhaps Senior Judge Tuttle's comment during oral argument that they should decide the instant cases to create a conflict with the Fourth Circuit in hopes that this Court would resolve the conflict was not as casually made as counsel thought at the time.

The conflicting versions as to where the jurisdictional line was intended to be drawn, the complexities and difficulties encountered, and the tremendous importance of an early and decisive resolution of the conflicts already existing before the decisions below have been enunciated in considerable detail in three previously filed Petitions for Writs of Certiorari in the *Caputo*⁴⁵ and *Blundo*⁴⁶ cases involved in the Second Circuit's opinion and the *Stockman*⁴⁷ case from the First Circuit. It would therefore serve no useful purpose for your Petitioners to repeat or restate the reasons therein urged why certiorari should be granted in some if not all of these cases in order that jurisdictional uncertainties caused by the 1972 Amendments may be resolved by this Court at the earliest possible time. Petitioners therefore adopt those arguments in the Petitions already on file and respectfully submit a prompt resolution of the jurisdictional questions is urgently needed to avoid any further waste of administrative and judicial time and effort on these troublesome and difficult jurisdictional issues.

Petitioners therefore confine themselves in this Petition to demonstrating the clear and irreconcilable conflicts between the decision of the court below and those of the other Courts of Appeals.

CONFLICT WITH THE FOURTH CIRCUIT

The opinion of the court below is in direct and irreconcilable conflict with the in banc decision of the Court of

45. *Northeast Marine Terminal Company, Inc. v. Caputo*, No. 76-444.

46. *International Terminal Operating Co., Inc. v. Blundo*, No. 76-454.

47. *John T. Clark & Son of Boston v. Stockman*, No. 76-571. Opinion below reported at 539 F.2d 264 (1st Cir. 1976).

Appeals for the Fourth Circuit in *Adkins*.⁴⁸ A majority of the Court of Appeals of the Fourth Circuit sitting in banc has excluded from coverage a shoreside worker loading cargo from a pierside warehouse onto shoreside transportation. In so doing, the majority subscribed to the "point of rest" principle articulated in the original panel majority opinion of the court.⁴⁹ Precisely to the contrary, the court below has specifically and in terms rejected the "point of rest" approach to defining the shoreward extent of post-amendment Longshoremen's Act jurisdiction and has accordingly held that a shoreside worker (Ford) loading cargo from shoreside storage onto a railroad car is covered by the amended Act and that a shoreside worker (Bryant) unloading cargo from shoreside transportation into a warehouse is covered by the amended Act. This direct conflict between the Courts of Appeals illustrates clearly the controversy over the extent to which the jurisdiction of the Act has been extended ashore, because the "point of rest" principle (adopted by one court and rejected by the other) is the jurisdictional guideline which effectuates the *O'Rourke-Noguiera* definition of maritime employment endorsed by Congress.⁵⁰

The original decision by a three-judge panel of the Fourth Circuit in *Adkins* resulted in the majority (Judge Winter and Chief Judge Haynesworth) holding that only those longshoremen who were directly involved in loading

48. *I.T.O. Corporation of Baltimore v. Adkins and Benefits Review Board*, ___ F.2d ___ (4th Cir. in banc, August 26, 1976), App. p. 96.

49. *I.T.O. Corporation of Baltimore v. Benefits Review Board*, 529 F.2d 1080 (4th Cir. 1975), reh. in banc granted.

50. See the full discussion of this Court's opinions in *O'Rourke* and *Noguiera*, *supra*, pp. 10-23.

and unloading a vessel between the first (last) point of rest on the dock were now covered by the Act for injuries sustained ashore. Judge Craven dissented on the basis that anyone involved in the overall loading or unloading of a vessel from the time of the cargo's first arrival at the dock on land transportation or until it was moved from the dock by land transportation was to be covered. The six-judge in banc panel divided four to two, with Judge Russell and Judge Widener subscribing to the basic principle of the first (last) point of rest expressed by the majority of the original panel, whereas Judge Butzner concurred in dissenting Judge Craven's opinion from the original panel.

The Fourth Circuit opinion involved three different employees, all involved in the handling of containerized cargo. The case in which the factual situation is completely analogous to the facts of *Ford* and *Bryant* involved the employee Adkins. In *Adkins*, "cargo . . . in containerized form is (was) unloaded from the ship and immediately transported to a holding or storage area on the . . . terminal" called a marshalling area where it remained for three days.⁵¹ From there it was moved to a warehouse shed where the container's individual packages or boxes were "stripped" from it and stored in the warehouse to await transshipment inland. Adkins was injured when he was moving the individual packages or boxes

51. Quoted from the last paragraph of the legislative history, in which Congress recorded the typical example of the employment ashore which it intended to cover. It was work up to this first point of rest which Congress intended to cover, including the work of checkers and other workers who were directly involved in the loading or unloading of vessels, but not all workers who were employed on a pier, dock or other adjoining areas. 1972 U.S. Code Cong. and Administrative News, p. 4708. (App. p. 185).

from warehouse storage onto a truck which would deliver them inland. The four-judge majority held Adkins was not covered by the extension of the Act ashore as he was not participating in the unloading of a vessel, but rather was handling the goods for transshipment on inland transportation.⁵²

The only difference between the view of Judge Widener and the other three judges comprising the majority as to the "point of rest" dividing line was exactly where it should be drawn. Judge Widener drew the dividing line at the place where the cargo was stored after being unloaded from the container in the warehouse to wait loading onto land transportation for transshipment ashore. The other three judges drew the line at the first point of rest when the container was unloaded from the vessel and immediately transported to a marshalling area on the terminal. This first point of rest is consistent with the *O'Rourke-Noguiera* maritime employment test as the members of the longshore gang involved in unloading the containers from the vessel and immediately transporting them to the marshalling area would all be engaged in work on a particular day which would subject them to performing a part of their labors upon the navigable waters of the United States. The movement further ashore of the point of rest by Judge Widener to the warehouse into which the cargo had been stripped (unloaded) from the container was based on his conclusion that until the individual

52. It is thus clear that the four-judge majority in banc would reach exactly the opposite result from that of the court below in *Ford*, as Ford was securing the military vehicle which had been loaded on a railroad car and thus was handling the vehicle for transshipment on inland transportation, and was not participating in the unloading of a vessel. It would also reach exactly the opposite result from the court below in *Bryant*.

packages or boxes of cargo had been removed from the container, the unloading of the individual boxes or packages of cargo from the vessel had not been completed.⁵³

It is clear that the four-judge majority in the Fourth Circuit would not extend the Act's coverage to either Ford or Bryant. As in *Adkins*, Ford was loading or securing inbound cargo aboard land transportation, and as Bryant was performing the same function as to outbound cargo in unloading land transportation neither would be considered by the four-judge majority to be covered by the Act as extended ashore by the 1972 Amendments. It is therefore clear that the decision of the Court of Appeals for the Fourth Circuit is in direct and irreconcilable conflict with the decision of the court below in both *Ford* and *Bryant*.

53. The other two employees involved in the Fourth Circuit case also involved containerized cargo. The employee Brown was operating a forklift on the waterfront terminal area and was picking up cargo and stuffing it or loading it into a container. Once the stuffing of the container was completed at the warehouse, it would then be moved to a marshalling area and from this marshalling area some days later a longshore gang would pick up the container and take it to the pier where it would be loaded immediately onboard a vessel. The employee Harris was operating a "hustler" with which the containers, once they had been stuffed with cargo, were moved to the marshalling area from which the container would then be taken to the pier and immediately loaded onboard a vessel some days later. Judge Widener thus extends the jurisdiction ashore for containerized cargo to the warehouse at which the stuffing and stripping of the containers takes place on a marine terminal because he considers the loading or unloading of the containers in the waterfront terminal warehouse to be a part of the overall loading or unloading of a vessel. He therefore concurred in the result reached by dissenting Judges Craven and Butzner producing an equal division of the in banc panel of the Fourth Circuit, which required an affirmance of the Benefits Review Board's decision that Brown and Harris were covered by the Act as extended ashore.

CONFLICT WITH THE THIRD CIRCUIT

The opinion of the Court below is also in direct and irreconcilable conflict with the decision of the Court of Appeals for the Third Circuit in the *Sea-Land Service* case in which the employee Johns was injured while driving a container of undetermined content in a terminal area.⁵⁴ The Third Circuit basically adopted the same "point of rest" dividing line as Judge Widener of the four-judge majority in the Fourth Circuit, and thus its decision is completely consistent with the result reached by the four-judge majority in the Fourth Circuit in *Adkins*. The Third Circuit holds that Congress intended to extend the Act ashore to this extent:

" . . . But the overall intention appears to be to afford coverage to all those employees engaged in handling cargo after it has been delivered from another mode of transportation for the purpose of loading it aboard a vessel (outbound cargo), and to all those employees engaged in discharging cargo from a vessel up to the time it has been delivered to a place where the next mode of transportation will pick it up (inbound cargo). . . . The key is the functional relationship of the employee's activity to maritime transportation as distinguished from such land-based activities as trucking, railroading, or warehousing." (Parenthetical expressions added) (App. pp. 132-133).

Thus, as to outbound cargo, until such time as the cargo has been unloaded from land transportation and stored in a pier-side warehouse from which it would then be loaded aboard a vessel (Bryant unloading the cotton from land transportation and storing it in the pier-side

54. *Sea-Land Service, Inc. v. Johns*, ____ F.2d ____ (3rd Cir. August 5, 1976), App. p. 114.

warehouse), the Third Circuit holds the Longshore Act inapplicable. Likewise as to inbound cargo once the cargo had been unloaded from the vessel and stored on the dock or in the pier-side warehouse from which the "next mode of transportation" would pick it up, work done thereafter in loading or securing it on the next mode of transportation (Ford securing the vehicle on the railroad car) would not be covered. Thus, the jurisdictional dividing line drawn by the Third Circuit would exclude both Ford and Bryant from coverage as they were both directly involved with another mode of transportation, either making first delivery of the cargo from a cotton dray wagon (truck) to the dock as in *Bryant* or in loading on or securing the cargo onto the next mode of transportation (railroad car) as in *Ford*. It is therefore clear that precisely the opposite result would have been reached by the Third Circuit from that arrived at by the court below in both the Ford and Bryant factual situations.

CONFLICT WITH THE SECOND CIRCUIT

The two-judge majority opinion in the *Pittston Stevedoring* case⁵⁵ from the Court of Appeals for the Second Circuit comes the closest to being consistent with the decision of the court below, but even it is in direct conflict with the decision of the court below because of a proviso which the Second Circuit attaches at least insofar as the employee Caputo is concerned.⁵⁶ Dissenting Judge Lum-

55. *Pittston Stevedoring Co. v. Dellaventura*, ____ F.2d ____ (2d Cir. July 1, 1976), App. p. 137.

56. While the *Blundo* case involved the stripping of a container and perhaps the proviso is not applicable to it, the *Caputo* facts are analogous to those in *Ford*. Caputo was helping a consignee's truck driver load boxes of cheese into the consignee's truck at a marine terminal adjoining navigable waters. The boxes of cheese had been unloaded from a vessel five days prior to the injury.

bard agreed with the holding of the two-judge majority of the Fourth Circuit panel that the first (last) point of rest was the extent to which Congress extended the Act's jurisdiction ashore.⁵⁷ The Second Circuit majority summarized its holding as to the extent the Act's jurisdiction was extended ashore as follows:

"We therefore hold that the Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee has stopped his vehicle at the pier) provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel. That is as far as we need to go to affirm *Blundo's* and *Caputo's* awards; whether the proviso is essential can be left for another day." (Page 32). ____ F.2d at ____, App. p. 178.

It is the proviso that the "employee has spent a significant part of his time in typical longshoring activity of taking cargo on and off a vessel" which would compel the two-judge majority in Second Circuit to join dissenting Judge Lumbard in denying coverage under the Longshoremen's Act in both *Ford* and *Bryant* (assuming, of course, that they would ultimately decide that the proviso was essential). This for the reason that the stipulated facts in *Bryant* demonstrate that he had not performed any typical long-

57. The in banc decision of the Fourth Circuit was not rendered until August 26, 1976, and thus Judge Lumbard's dissent, having been rendered on July 1, 1976, is based on the original decision of the Fourth Circuit.

shoring activity of taking cargo on or off a vessel for five years prior to his injury (App. p. 63). As to *Ford*, the stipulated facts show that in the year immediately prior to his injury, Ford had worked for a beer distributing company and for a construction company in completely shoreside employment and he had worked a total of 39 days as a warehouseman and only seven days as a longshoreman taking cargo on and off a vessel (App. p. 38). We hardly think that the Second Circuit would conclude that seven days' work as a longshoreman, that is, taking cargo on or off a vessel, in a year constituted a significant part of his time.⁵⁸ Thus, neither *Ford* nor *Bryant* would satisfy the Second Circuit's proviso and therefore the holding of the court below in both *Ford* and *Bryant* is in direct conflict with the result which would be reached by all three judges of the Second Circuit if they had the *Ford* and *Bryant* factual situations before them.⁵⁹

58. Petitioners do not believe there is any basis in the Act or in the legislative history of the 1972 Amendments which justifies the adoption of this proviso by the Second Circuit, but having relied on it in deciding an almost identical factual case, we can only assume they would apply it to the *Ford* and *Bryant* facts. While as the Court has undoubtedly surmised, we agree with very few of the holdings of the Court below, its conclusion that the employee's duties at the time of his injury are controlling is not only legally correct, *Long Island Railroad Co. v. Lowe*, 145 F.2d 516, at 518 (2nd Cir. 1944), but the only practical basis on which jurisdictional issues can be resolved.

59. The decision of the Court of Appeals for the First Circuit in its *Stockman* case, 539 F.2d 264 (1st Cir. 1976), involved an employee who was injured while stripping cargo out of a container which had been unloaded from a vessel some three days before. The First Circuit adopted the view of the two-judge majority in the Second Circuit that all stuffing or stripping containers on a situs covered by the Act was intended to be covered by the 1972 Amendments extending the Act's jurisdiction ashore. While it quoted with apparent approval that portion of the Second Circuit's opinion which would reach those workers who were loading the stripped cargo out

SUMMARY OF CONFLICTS AS TO JURISDICTION

From the foregoing, it is apparent that the Second, Third and Fourth Circuits have expressed their views on the extension of the Longshoremen's Act ashore by the 1972 Amendments sufficiently to reach the factual situations of the strictly warehouse work being done by Ford and Bryant in the instant cases, as distinguished from the typical longshoring activity of taking cargo on or off a vessel. A total of 12 Circuit Judges have been involved in these opinions. As the foregoing discussion demonstrates, only the two dissenting justices in the Fourth Circuit's in banc decision would reach the same result as the reduced two-judge panel of the court below. The other 10 Circuit Judges (four in the Fourth, three in the Third and three in the Second) would reach exactly the opposite result from that of the Court below. This Petition should be granted to resolve these conflicting decisions and to draw a meaningful jurisdictional dividing line.

3. OTHER CONFLICTS AMONG THE CIRCUIT COURTS OF APPEALS.

The current disarray in post-amendment Longshoremen's Act jurisprudence is reflected in the appellate treatment of subsidiary issues as well as of the fundamental

of the warehouse onto land transportation for transshipment inland if they met the proviso, 539 F.2d at 275-276, the First Circuit's opinion expressly declined to reach the question, 539 F.2d at 277. Thus, the holding of the court below in *Ford* and *Bryant* was not reached by the First Circuit and it expressly declined to decide the issue; and its opinion is strictly limited to the stuffing and stripping of containers on a marine terminal and does not involve the loading or securing of cargo on land transportation as in *Ford* or the unloading and storing of cargo in the pier-side warehouse from land transportation as in *Bryant*.

question of the extent to which Congress extended the jurisdiction of the Act ashore. How much deference is owed by a Court of Appeals to the Benefits Review Board of the Department of Labor with regard to a fundamental question of statutory interpretation involving the extension of federal jurisdiction? The Courts of Appeals for the First⁶⁰ and Second Circuits⁶¹ have explicitly declined to defer to the Benefits Review Board, doubting any superiority of the administrative agency in matters of statutory interpretation⁶² and criticizing the cursory treatment afforded by the Board to this important question.⁶³ By way of contrast, the court below explicitly declined to look beyond the Board's decision "so long as there is a reasonable legal basis for the Board's conclusions [citations omitted]" (539 F.2d at 541, App. p. 18). Indeed, in the *Bryant* case, the court specifically limited its analysis:

"Also, we are bound to respect the Board's conclusions if they are supported by the record and if they have a reasonable legal basis. In view of the limited nature of our review, we cannot say that the Board erred in defining Bryant's work status." 539 F.2d at 544, App. p. 24.

Contrast the First Circuit statement that "as the focus is upon the meaning of the statute, the judgment must be our own, not the Board's." 539 F.2d at 270. Even

60. *Stockman v. John T. Clark & Son of Boston*, 539 F.2d 264 (1st Cir. 1976), petition for certiorari pending, No. 76-571.

61. *Pittston Stevedoring Company v. Dellavente*, ____ F.2d ____, App. p. 137, (2d Cir. 1976), petition for certiorari pending in the *Blundo* (No. 76-454) and *Caputo* (No. 76-444) cases within this opinion.

62. *Stockman*, *supra* n. 60, 539 F.2d at 269.

63. *Pittston*, *supra* n. 61, App. p. 164.

more significantly, the Court of Appeals for the Second Circuit quoted this Court for the proposition that an "agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate" *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973), and "therefore reject[ed] the argument that the BRB's decisions in these cases must be affirmed if they are rational but wrong." ____ F.2d at ____, App. p. 165. It is just such a "bootstrap" operation of bureaucratic self-aggrandizement in which the Board has been engaged and to which the court below has given deference, and this Court should grant a writ of certiorari in these cases to correct this error and to establish the proper standard of judicial review of Benefits Review Board interpretation of jurisdictional provisions of the Longshoremen's Act.

A similar conflict among the Courts of Appeals exists with regard to the statutory presumption that a claim comes within the provisions of the Act. 33 U.S.C.A. §920(a). The court below considered itself "bound by a statutory presumption that an individual claim comes within the Act's coverage." 539 F.2d at 541, App. pp. 17-18. In contrast, the First Circuit panel said the basic interpretative decision concerning the jurisdictional applicability of the "must precede any application of the pre-actability of the Act" "must precede any application of the pre-act the Second Circuit also stressed the inapplicability of the presumption to "an interpretation question of general import" such as the jurisdiction of the Act, ____ F.2d at ____, App. pp. 160-161, while the Third Circuit panel apparently did not rely on or even mention the presumption at all. ____ F.2d at ____, App. p. 114. Finally, the opinion adopted in principle by the majority of the Court

of Appeals for the Fourth Circuit sitting in banc is criticized by Judge Craven in dissent for its failure to give "sufficient weight, if any," to the statutory presumption. 539 F.2d 1080, 1091. Thus the four other Courts of Appeals which have dealt with the jurisdiction of the amended Act in this context have not been constrained by the statutory presumption, while the court below said it was "bound" in its deliberations by that self-same presumption.⁶⁴ A writ of certiorari in these cases should instruct the court below in the way to approach fundamental jurisdictional questions and should correct the court's error in these cases.

Yet another conflict arises from the failure of the court below to apply even rudimentary due process considerations to the assessment of attorneys' fees by the Benefits Review Board. 539 F.2d at 546, App. pp. 29-30. The court below held that an ex parte, unverified application by counsel could support an award of attorney's fees pursuant to the amended Longshoremen's Act without violating the due process clause of the Fifth Amendment to the Constitution. This blind faith in administrative omniscience is in direct conflict with the opinion of the Court of Appeals for the Third Circuit in *Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs*, ___ F.2d ___, 4 BRBS 79, 84, (3rd Cir. June 23, 1976). The Third Circuit explicitly requires (1) an application, (2) supported by an affidavit, (3) with opportunity to respond and (4) provision for hearing

64. In *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935), this Court held the presumption of the Act to be inapplicable when substantial evidence on an issue is present. The Administrative Law Judges below both found that substantial evidence existed on the jurisdiction issue. *Ford*, App. p. 50; *Bryant*, App. p. 86.

in a proper case, with regard to fees to be set by that court for services rendered in proceedings before the court. How can a lesser standard be consistent with the due process requirements before the Benefits Review Board, a panel two of whose members are not even attorneys? The answer is that the opinion of the court below cannot be consistent with due process standards, and moreover, that lack of due process is emphasized by the conflict with the opinion of the Third Circuit cited above.

CONCLUSION

In view of the conflict of the decisions and opinion below with the prior decisions of this Court and with the contemporaneous decisions of the various Courts of Appeals, and particularly in order to resolve authoritatively the extent to which the Longshoremen's Act Amendments of 1972 extended federal jurisdiction ashore, Petitioners respectfully pray that this Court grant a writ of certiorari and reverse the decisions of the court below.

Respectfully submitted,

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